

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE TYRONE WAITS,

Defendant-Appellant.

UNPUBLISHED

September 21, 2006

No. 261846

Presque Isle Circuit Court

LC No. 04-092206-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions of home invasion, second degree, MCL 750.110a(3); unlawfully driving away an automobile (UDAA), MCL 750.413; and felon-in-possession of a firearm, MCL 750.224f. He was sentenced as an habitual offender, third offense, to 4 to 30 years' imprisonment for home invasion, second degree, and 34 to 120 months' imprisonment for each of the other offenses. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal defendant claims that due process requires reversal of his convictions because the prosecutor denied him a fair trial by bolstering the credibility of the primary prosecution witness, Delores Deloy, by eliciting inflammatory references to his character, and by improper prosecutorial remarks. We disagree. Defendant did not object to the comments of the prosecutor or the admission of any bad acts evidence. In the absence of an objection, appellate review is limited to whether the admission of the evidence constituted plain error that affected defendant's substantial rights resulting in the conviction of an innocent person or that seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A prosecutor may not vouch for a witness. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992). However, a prosecutor's comment affirming the credibility of a cooperating witness is not misconduct unless the prosecutor personally assures the witness's veracity, lends the prestige of the office to the witness, or claims to have special knowledge, unknown to the jury, that the witness is testifying truthfully. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995); *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); *Stacy*, *supra* at 39. The prosecutor has a duty to disclose any promises made to secure an accomplice's testimony. *People v Rosales*, 160 Mich App 304, 310; 408 NW2d 140 (1987).

In this case, the prosecutor did not personally vouch for Deloy's credibility or suggest that he had any special knowledge that Deloy was testifying truthfully. The prosecutor's examination of Deloy disclosed that the terms of Deloy's plea agreement required her to testify truthfully. The prosecutor even indicated that Deloy initially did not implicate herself until she received a very favorable plea agreement. Defense counsel questioned Deloy about the favorable terms of her plea agreement, raising the implication that she had a motive to fabricate her testimony. We find that the prosecutor's disclosure of Deloy's plea agreement requiring her to testify truthfully did not impermissibly vouch for Deloy's credibility or affect the outcome of the trial.

A prosecutor also may not elicit evidence of the defendant's other crimes, wrongs, and bad acts to prove that he acted in conformity with his criminal character in committing the charged offenses. MRE 404(b); *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). However, a prosecutor may offer evidence of prior "bad acts," if the evidence (1) is relevant, (2) its potential prejudice does not substantially outweigh its probative value, and (3) it is offered for a proper purpose under MRE 404(b)(1). *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994).

Defendant challenges the prosecutor's questions to a police officer about how defendant left the farmhouse, the subject of the home invasion charge, after the officer testified that defendant stated that Deloy drove him to the farmhouse. The officer said that defendant told him that he drove away from the house in a Jeep that two unidentified male friends of Deloy's loaned to him. The officer testified that defendant told him he did not know if the Jeep was stolen, but that "something wasn't quite right with it." Defense counsel did not object to this line of questioning. On cross-examination, defense counsel asked the officer if he had knowledge that the Jeep was indeed stolen, and that defendant had pleaded guilty to the theft; the officer confirmed that he knew the Jeep was stolen, but that he did not know that defendant had pleaded guilty. We find that the prosecutor's initial inquiry about the Jeep was not an improper question, although defense counsel's follow-up questions, in retrospect, might have been ill-advised.

Defendant also challenges several remarks made by the prosecutor that reflect poorly on defendant's character. Specifically, defendant objects to the prosecutor's opening statement comments that defendant "has described himself to investigating police officers as just a poor, homeless guy down on his luck" and that although his main witness might be a person of questionable character, one could not expect "a Sunday-school teacher" to be "riding with the defendant." Defendant also objects to the prosecutor's questions to a police officer eliciting defendant's failure to affirm paternity of his child with Deloy. And defendant objects to the prosecutor's questions of Deloy that elicited various character assassinating tidbits such as that her parents would not allow him in their home, that he was a habitual thief, that he encouraged her to steal also, and that he physically abused her.

Prosecutorial remarks require reversal if they deny a defendant a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Where defense counsel fails to object at trial, appellate review of improper prosecutorial remarks is generally precluded because the failure to object deprives the trial court of the opportunity to cure the error. *Carines*, *supra* at 764. However, even in the absence of an objection, a claim of prosecutorial misconduct may be reviewed for plain error. *Id.* at 764. Appellate review is proper if a curative instruction

could not have eliminated the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

We find, with respect to the challenged remarks from the prosecutor's opening statement, that the prosecutor came dangerously close to the line of misconduct, making remarks that if not improper, were certainly unnecessary. However, we also find that the trial court's instruction to the jury that the remarks of counsel were not evidence is sufficiently curative here.

We find that the challenged question to the police officer was part of the prosecutor's overall inquiry of that officer as to defendant's explanation to the officer of how he came to be staying in the farmhouse that is the subject of the home invasion charge. Defendant had suggested to the officer that Deloy was "victimizing him" and had a "hostile attitude" toward him; the prosecutor appears to have been trying to establish some parameters of their relationship.

We find that the challenged character evidence embedded in Deloy's testimony was actually volunteered in nonresponsive answers to the prosecutor's questions. Nonresponsive answers to a prosecutor's question by a prosecution witness are not attributable as misconduct to the prosecutor, unless the prosecutor knew, encouraged, or conspired with the witness to provide the unresponsive testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). In this case, the record establishes that Deloy volunteered information about which the prosecutor did not inquire, and her answers were, to that extent, nonresponsive. Further, defendant has not shown that the prosecutor knew, encouraged, or conspired with Deloy to provide any testimony about defendant's bad acts.

Based on our review of the record in its entirety, we find that defendant's claims of prosecutorial misconduct or improper introduction of character evidence do not rise to the level of reversible error.

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel failed to object to the prosecutor's misconduct in bolstering Deloy's credibility and in eliciting improper references to defendant's character. We review de novo a claim of ineffective assistance of counsel. *People v Northrop*, 213 Mich App 494, 497-498; 541 NW2d 275 (1995). To establish ineffective assistance of counsel under the federal or Michigan constitutions, a defendant must show that counsel's performance fell below an objective standard of reasonableness and prejudiced the defendant by depriving him of a fair trial. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). The defendant must show the existence of a reasonable probability that, but for counsel's allegedly deficient performance, the result of the proceeding would have been different. *LeBlanc, supra* at 579; *Pickens, supra* at 314. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Here, defendant failed to show that defense counsel's allegedly deficient performance was not part of a sound trial strategy. First, as to the bolstering of Deloy's credibility, we reiterate our finding that the prosecutor did not improperly bolster the credibility of the witness, and we add that because the full disclosure of Deloy's plea agreement tended to undermine her credibility because it showed that she had a motive to fabricate testimony, failure to object was

reasonable. Next, as to the allegedly improper character evidence, we find that although a reasonable attorney might have objected to Deloy's unsolicited comments about defendant's character, we cannot say that "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Pickens, supra* at 343 (quoting *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052 (1984)).

In addition, given the evidence presented against defendant, key elements being the broken lock on the farmhouse, defendant's fingerprints inside that house and inside the stolen car, we find that defendant has not shown a reasonable probability that the outcome of this trial would have been different had his counsel objected to Deloy's comments about his generally bad character. Accordingly, we conclude that defendant has not shown that he was denied the effective assistance of counsel at his trial.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Jessica R. Cooper